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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAMUEL J. PINKNEY et al.,

Plaintiffs and Appellants,

v.

CAMERON BROTHERS CONSTRUCTION
CO., et al.,

Defendants and Respondents.

D052385

(Super. Ct. No. GIE029760)

APPEAL from a judgment of the Superior Court of San Diego County, Jan I.

Goldsmith and Laura Whitcomb Halgren, Judges. Affirmed.

I.

INTRODUCTION

Appellant Samuel Pinkney¹ appeals from a judgment of the trial court after a jury trial. Pinkney filed this lawsuit against defendants Cameron Brothers Construction Co., William Cameron Family Management Co., Inc, Sharlene Cameron, and Richard Voight

¹ Pinkney is joined in this action by Gerald Davis, the trustee of Pinkney's bankruptcy estate. Where appropriate, we will refer to the plaintiffs jointly as "Pinkney."

(referred to jointly as Cameron Brothers) after Cameron Brothers terminated Pinkney's employment as a maintenance manager at a mobile home park in Santee, California.

Pinkney, who is African-American, alleged multiple causes of action against the defendants, including causes of action for wrongful termination based on race, defamation (against Voight individually), and retaliation for Pinkney's filing a discrimination complaint against Cameron Brothers. In a special verdict form, a jury found in favor of Cameron Brothers on all three of Pinkney's causes of action.

On appeal, Pinkney contends that the trial court erred in instructing the jury that he was an "at will" employee. According to Pinkney, once he met his burden to make a prima facie showing of disparate treatment, Cameron Brothers bore the burden to "present evidence of a legitimate non-discriminatory reason for terminat[ing]" Pinkney, and Pinkney's "at will" employment status was not a defense to the discrimination claim.

Pinkney also challenges two of the jury's findings. Pinkney first contends that the jury's finding that Voight's defamatory statements about Pinkney did not tend to injure Pinkney in his occupation is erroneous as a matter of law. Pinkney asserts that no reasonable person could have found that Voight's defamatory statements — false accusations that Pinkney had refused to follow Cameron Brothers's employment policies — did not tend to injure Pinkney with respect to his employment.

Second, Pinkney asserts that there is insufficient evidence to support the jury's finding that Voight did not retaliate against Pinkney for Pinkney's filing a complaint against Cameron Brothers with the Department of Fair Employment and Housing (DFEH). Specifically, Pinkney complains that Voight essentially admitted that Pinkney's

filing a discrimination claim against Cameron Brothers motivated, in part, Voight's decision to file a petition for a restraining order against Pinkney.

We conclude that whether the trial court erred in instructing the jury about "at will" employment is immaterial because Pinkney cannot establish that the instruction was prejudicial under the circumstances. We further conclude that based on the evidence presented at trial, the jury could have reasonably found that Voight's false statements about Pinkney did not tend to injure Pinkney in his occupation. Finally, we reject Pinkney's challenge to the jury's finding that Pinkney's complaint to DFEH was not a motivating reason underlying Voight's decision to file a petition for a restraining order against Pinkney. We therefore affirm the judgment of the trial court.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

Cameron Brothers owns an East County mobile home park called Cameron Mobile Estates, which serves primarily elderly residents. In 2002, Cameron Brothers hired Pinkney to be a maintenance director at Cameron Mobile Estates. Pinkney is a certified building technician. Pinkney was attracted to the job, in part, because the compensation included housing at the park.

Sharlene Cameron served as park manager when Pinkney was hired. Sharlene told Pinkney that he would be the first Black resident of the park. Pinkney did good work at the park, and received acknowledgement for the quality of his work. Sharlene lobbied for

Pinkney to receive multiple raises during his tenure at Cameron Mobile Estates, even at times when raises were not ordinarily given.

Pinkney was the only maintenance manager at Cameron Mobile Estates for approximately a year and a half. However, because there was too much work for one person, in 2004 Cameron Brothers hired Voight, a Caucasian, to perform maintenance work at the park.

At trial, the parties disputed whether Cameron Brothers had a policy against permitting maintenance personnel to perform side jobs for the residents. Cameron Brothers instructed all tenants and new maintenance personnel that they were not to perform side jobs in or on the residents' homes, but the rule was difficult to enforce. Both Pinkney and Voight performed side jobs for residents in exchange for gratuities. Pinkney estimated that he received approximately \$140 to \$150 in gratuities in a year, as well as gifts of various food items, related to side jobs he performed for residents.

At a July 2004 staff meeting that both Voight and Pinkney attended, Sharlene Cameron and Waneta Lee, another member of the Cameron family who was an employee of Cameron Brothers, informed the staff that company policy prohibited maintenance workers from performing side jobs for residents.

Pinkney offered evidence that Sharlene and John Cameron, Sharlene's father and head of the Cameron family, had made racist statements.² Pinkney also presented evidence that after he discussed with Sharlene the fact that he was having difficulty

² The Camerons denied having made the statements.

sticking to his diet for diabetes because park residents had been giving him sweets, Sharlene designed a poster of a black bear wearing a maintenance belt with the caption, "Please don't feed the maintenance man." Sharlene took the poster down after a week or two, when someone mentioned to her that the poster "might not be politically correct."

In November 2004, Pinkney received a disciplinary notice pertaining to his supervision of a group of gardeners who had cleared brush from a hillside. The notice criticized Pinkney for allowing the gardeners to remove all of the brush from the hillside, rather than just one bush that was growing through lattice fencing. The removal of all of the brush created the potential for a mudslide during the rainy season.

The second disciplinary notice Pinkney received involved Pinkney helping a resident to install a toilet in December 2004. Pinkney testified that he had helped the man carry the toilet up some steps after Pinkney noticed the man struggling as he tried to get the toilet up the steps himself. Pinkney helped the man place the toilet in the bathroom, hooked up the water line, and bolted the toilet in place. Later, after the toilet started to leak, the resident called the park's management office to ask for Pinkney's assistance to repair the leak. Sharlene instructed Pinkney that he was not to do any other side jobs for residents. The incident report informed Pinkney that he was not to "work on, or inside, a resident's home unless it is in the course of Cameron's park business, or the resident is living in one of our rental homes." The notice informed Pinkney that "any damage you inadvertently do in the home could cause a liability to the company."

On February 8, 2005, a resident asked Pinkney if she could have a small set of wooden stairs that had been designated as trash and placed near a dumpster in a

maintenance area. The woman commented that the stairs were slightly too tall for her needs. Pinkney noticed that there was some rotted wood near the bottom of the stairs, and indicated that he could cut off the rotted part, and that the resident could see whether that helped. Without taking any measurements, Pinkney cut the rotted wood off the bottom of the stairs, which helped make the stairs more stable. After he finished doing his other tasks, Pinkney put the stairs on a hand truck and dropped them off at the woman's home. He was not sure where she wanted the stairs or how she intended to use them, so he left the stairs near her driveway.

On February 9, Sharlene noticed that a set of stairs was missing from the park's maintenance area, and that there was a mess consisting of wood and sawdust on the ground in that area. Sharlene asked some maintenance workers what had happened, and they eventually told her that Pinkney had created the mess. Sharlene gave Pinkney another disciplinary notice which stated that Pinkney had "again been working on the home of one of [Cameron Brothers's] residents." Pinkney said that he had not been working on the residence, but had simply delivered the stairs to the residence. Sharlene said to Pinkney, "You installed the steps," which Pinkney denied. The woman who received the stairs told Sharlene during Sharlene's investigation of the incident that Pinkney had not installed the stairs.

Sharlene contacted Waneta Lee, who, in addition to her other duties at Cameron Brothers, made "hiring and firing decisions." Sharlene told Lee that Pinkney had given stairs to a tenant and that the stairs had been "cut down to match the tenant's height of the coach." Lee told Sharlene to give Pinkney a "writeup" and said that she would get back to Sharlene regarding "what we were going to do about it." After speaking with Sharlene and Jonna Long, the human resources director, Lee made the decision to terminate Pinkney's employment. Lee testified that she made the decision alone, and said that the fact that Pinkney "was Black" did not have anything whatsoever to do with her decision to terminate Pinkney. Pinkney was terminated as of February 9, 2005.

Pinkney filed claims for racial discrimination with DFEH in February and March 2005. Pinkney continued to live at the park for six months after his employment was terminated because he was unable to find other housing. On July 28, 2005, Voight filed an application for a restraining order against Pinkney in which he claimed that Pinkney had assaulted him, and that Pinkney had been spreading rumors about Voight and the Camerons. Pinkney denied the allegations. Pinkney hired counsel and appeared at the hearing on Voight's application, but Voight did not appear.

B. *Procedural background*

On November 15, 2005, Pinkney filed a complaint against the Camerons, Cameron Brothers, other corporations run by the Cameron family, and Voight.³ Pinkney alleged causes of action for (1) wrongful termination in violation of Government Code

³ The operative complaint is the fourth amended complaint.

§ 12940, subdivision (a);⁴ (2) defamation (against Voight alone); (3) retaliation in violation of Government Code section 12940, subdivision (h);⁵ (4) intentional and negligent infliction of emotional distress; and (5) negligence. The first three causes of action were tried before a jury. While Cameron Brothers notes in its appellate brief that the trial court disposed of the final two causes of action pursuant to a motion for summary adjudication, the record is silent with regard to the disposition of these two causes of action.

The jury heard testimony from 10 witnesses, including Pinkney and Voight. On October 5, 2007, the jury found in favor of the defendants on all three causes of action. With respect to Pinkney's unlawful termination claim, the jury found that Cameron Brothers had terminated Pinkney's employment, but that Pinkney's race was not a

⁴ The portions of Government Code section 12940 relevant to Pinkney's unlawful termination claim provide: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

⁵ The portions of Government Code section 12940 relevant to Pinkney's retaliation claim provide: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: [¶] . . . [¶] (h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

motivating reason for Cameron Brothers' decision to terminate him. With respect to Pinkney's defamation claim, the jury found that Voight had made defamatory statements about Pinkney, but that Voight's defamatory statements did not tend to injure Pinkney in his occupation. Finally, as to Pinkney's retaliation claim, the jury found that Pinkney's complaint with the DFEH was not a motivating reason for Voight's decision to file a petition for a restraining order against Pinkney.

Pinkney moved for a new trial on November 26, 2007. The trial court heard argument on Pinkney's motion in December 2007, and in January 2008, the court entered an order denying the motion.

Pinkney filed a timely notice of appeal on January 22, 2008.

III.

DISCUSSION

A. *The trial court did not commit reversible error in instructing the jury concerning "at will" employment*

Cameron Brothers requested that the court give CACI No. 2400, an instruction concerning "at will" employment. In response to Pinkney's objection to the giving of this instruction, the court stated:

"And I have overruled that [objection], and I will give 2400 in its CACI form. And my reasoning is that the plaintiff has submitted evidence questioning the reasons why the defendant terminated Mr. Pinkney's employment. [¶] There is evidence as to his popularity among the residents, the good job he was doing, et cetera, and also questioning – and certainly there will be argument – questioning the basis for termination having to do with the stairs incident. [¶] The jury – I do not want the jury to be confused that there needs to be good cause for termination. There does not need to be good cause. [¶] The evidence received had to do with the issue of whether there was

a pretext for termination. The reasons were actually a pretext for alleged racial discrimination; so the quality of his employment, input before termination by the residents, was of evidentiary value. [¶] But I believe that – and this was at the request of – 2400 was [the] request of the defense. I think it was appropriate to clarify that, this is not a good cause case. This is a discrimination case." [¶] . . . [¶] I am going to give that instruction [i.e., CACI No. 2400] preceding 2500, which helps the jury in clarifying."

The court ultimately decided to instruct the jury as follows:

"An employment relationship may be ended by either the employer or the employee, at any time, for any lawful reason, or for no reason at all. This is called 'at-will employment.' [¶] An employment relationship is not 'at will' if the employee proves that the parties, by words or conduct, agreed that the employee would be discharged only for good cause."

Pinkney contends that the trial court's instruction to the jury that he was an "at will" employee "does not accurately state the law applicable to a case of racial discrimination." According to Pinkney, under *McDonnell Douglas Co. v. Green* (1973) 411 U.S. 792, 802 (*McDonnell Douglas*), an employer has the burden to provide "cause" to support the unequal treatment of a protected class member. Relying on the burden shifting test in *McDonnell Douglas*, Pinkney contends that if Cameron Brothers presented no evidence of an "explanation of cause," then a jury would be required to find Cameron Brothers liable for racial discrimination.

Pinkney further contends that the court's "at will" instruction permitted Cameron Brothers to argue to the jury that "Pinkney was entitled to no explanation [because of his 'at will' status] and, in fact, that Cameron's offering of a reason was proof it had no improper motives." Pinkney contends that "[t]o tell a jury incorrectly that the employer was never under an obligation to establish or articulate 'cause' destroys the dynamic of

inferences one draws from pretext, and replaces it with something quite confusing."

Finally, Pinkney complains that the trial court "compounded" its instructional error by refusing to give what his trial attorney called "the *McDonnell Douglas* instruction," which would have explained to the jury that the jury could infer discrimination if it found that Cameron Brothers gave a false reason for terminating Pinkney's employment.⁶

Cameron Brothers disputes Pinkney's description of the relevant law. Specifically, Cameron Brothers asserts that the test set out in *McDonnell Douglas* "is consistent with California's at-will employment laws" because "[u]nder [that] test, an employer does not need a good reason to terminate an employee, and may even have an arbitrary reason, just as long as that reason is non-discriminatory." Cameron Brothers also contends that California law regarding "at will" employment is consistent with federal law, and points

⁶ Pinkney's proposed "*McDonnell Douglas* instruction" read as follows:

"To prove plaintiff's claims, no particular type of evidence is required to be presented. You may use circumstantial evidence to infer one or more motives for plaintiff's discharge. While circumstantial and direct evidence have equal weight, defendant Cameron has the burden in this case of coming forward with evidence of a legally permissible basis for termination.

"If you find that the defendant gave false or pretextual reasons for the discharge, you may infer that such pretext were [*sic*] intended to conceal a prohibited motivation for plaintiff's termination or infer a racial motivation due to the absence of other plausible motives.

"You may not consider other reasons for termination not articulated by Cameron in this case. You may also consider whether plaintiff was treated differently than other employees, whether other persons of plaintiff's race were mistreated, or whether defendant's comments or actions reflected bias or hostility towards plaintiff's race."

to CACI No. 2400 in support of its position, noting that the "at will" instruction permits an employer to terminate an employment relationship with an employee "for any [lawful] reason." (CACI No. 2400.)⁷ Cameron Brothers further argues that the *McDonnell Douglas* burden shifting test is for the court to apply, not the jury. (See *Caldwell v. Paramount Unified School District* (1995) 41 Cal.App.4th 189, 202 ["[T]he construct of the shifting burdens of proof enunciated in *McDonnell Douglas* is an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process."].) Cameron Brothers argues that the trial court thus was not required to further instruct the jury in the manner that Pinkney requested, and that, in fact, it would have been error for the court to do so.

We need not decide whether the trial court erred in instructing the jury regarding Pinkney's "at will" employment status, because even if we assume that the trial court did err in giving the jury this instruction, we conclude that any error was harmless, since it is not reasonably probable that Pinkney would have obtained a more favorable result absent the error. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570 (*Soule*).)

In determining whether an instructional error was prejudicial, "we must examine the evidence, the arguments, and other factors to determine whether it is reasonably probable that instructions allowing application of an erroneous theory *actually* misled the jury." (*Soule, supra*, 8 Cal.4th at p. 581, fn. 11.) "In assessing prejudice from an

⁷ Although CACI No. 2400's template instruction places the word "lawful" in brackets, the written instruction that the court provided to the jury included the word "lawful," without the surrounding brackets.

erroneous instruction, we consider, insofar as relevant, '(1) the degree of conflict in the evidence on critical issues [citations]; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect [citation]; (3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; (4) the closeness of the jury's verdict [citation]; and (5) the effect of other instructions in remedying the error [citations].' [Citations.]" (*Id.* at pp. 570-571.)

The core of Pinkney's argument appears to be that the "at will" instruction somehow misled the jury into believing that it could not infer the existence of a discriminatory motive even if it were to reject Cameron Brothers' proffered non-discriminatory reason for firing Pinkney. The record does not support Pinkney's argument.

The fact that Pinkney was an "at will" employee was not in dispute. While evidence of Pinkney's "at will" status was admitted in evidence, counsel for Cameron Brothers did not argue to the jury that Cameron Brothers could terminate Pinkney's employment for a discriminatory reason. Although defense counsel suggested that Cameron Brothers did not need a reason to fire Pinkney because he was an "at will" employee, the arguments made by both counsel informed the jury that it had to decide whether racial discrimination had played a role in Pinkney's firing. There was no suggestion that Pinkney's "at will" status meant that the jury could not consider whether Cameron Brothers' proffered reason for terminating Pinkney was pretextual, and if they so found, infer from this fact that racial discrimination was a motivating factor in Pinkney's termination.

Further, the instructions that the court provided to the jury, as a whole, clearly indicated that the jury had to determine whether race was a factor in Cameron Brothers's decision to terminate Pinkney's employment, and that a decision based in any part on Pinkney's race would be unlawful, regardless of Pinkney's status as an "at will" employee. For example, at the request of both parties, the court gave the following instruction:

"Plaintiff brings a claim under the [*sic*] section 12940 of the California Government Code. That section prohibits many forms of discrimination, including racial discrimination, and also prohibits retaliation against a person who complains of such discrimination, and provides that persons subject to such discrimination or retaliation are entitled to compensatory damages. [¶] Plaintiff contends that race was a motivating factor in his termination and that his complaint of race discrimination was a motivating factor in an application for a restraining order, which was later filed against him. He has the burden of proving these allegations."

The trial court also instructed the jury with CACI No. 2500, as follows:

"Samuel J. Pinkney claims that Cameron Brothers Construction Co., L.P., wrongfully discriminated against him. To establish this claim, Samuel J. Pinkney must prove all of the following:

- "1. That this Defendant was his employer;
- "2. That Samuel J. Pinkney was its employee;
- "3. That this defendant discharged Samuel J. Pinkney;
- "4. That Samuel J. Pinkney's race was a motivating reason for the discharge;
- "5. That Samuel J. Pinkney was harmed; and
- "6. That the discharge was a substantial factor in causing Samuel J. Pinkney's harm."

Both of these additional instructions are correct statements of the law pertaining to claims of disparate treatment, such as Pinkney's. Further, the challenged instruction did not inform the jury that Pinkney's "at will" employment status meant that Cameron Brothers could terminate Pinkney's employment for any reason at all, but rather, that Cameron Brothers could terminate Pinkney's employment for any *lawful* reason. This part of the instruction, together with the additional instructions regarding the discrimination claim, sufficiently alerted the jury that it would have to find for Pinkney if it concluded that race was a motivating factor in Pinkney's dismissal.

There is no indicator in the record that the jury was misled in the manner that Pinkney suggests. Pinkney contends that if the jury rejected Cameron Brothers' proffered reason for his termination but knew that Cameron Brothers was legally permitted to give no reason at all for the termination, then the jury might not have understood that it could infer discrimination on the basis of a pretextual justification. Nothing in the "at will" instruction suggested to the jury that if it found Cameron Brothers' reason for terminating Pinkney to be pretextual, it could not infer discrimination from this finding. Further, there is no basis to conclude, as Pinkney suggests, that the jury was led to believe that Cameron Brothers' attempt to give a reason for terminating Pinkney's employment constituted irrefutable proof of the absence of discrimination since Cameron Brothers did not have to give any reason at all for the termination. Rather, it seems clear that the jury was aware that it could reject Cameron Brothers' explanation and, based on that rejection, infer that racial discrimination was a motivating factor for Pinkney's termination.

Moreover, the record does not support the conclusion that the jury rejected Cameron Brothers' articulated reason for terminating Pinkney's employment, such that the jury ever had to decide whether to infer discrimination based on a pretextual justification for the firing. In the special verdict form, the jury was specifically asked the pertinent question with respect to the discrimination claim—that is, whether the employer's discriminatory intent was a motivating factor in the adverse employment decision. The jury answered this question in the negative.⁸ The jury thus clearly found that Pinkney did not meet his burden to demonstrate that race was a motivating factor in Cameron Brothers' termination of his employment.

Not only did the jury find for Cameron Brothers on this claim, but it returned verdicts in favor of Cameron Brothers on all of Pinkney's claims, suggesting that the jury rejected Pinkney's theories and evidence, and that it believed much of the evidence that Cameron Brothers presented. Indeed, much of the evidence that suggested potential racial animus centered on Sharlene and John Cameron, but not Waneta Lee, who testified that she, alone, made the decision to fire Pinkney after he had been given multiple warnings. Lee testified that race was not a factor in her decision. The jury's answers to the special verdict questions suggest that the jury believed Lee's testimony.

We reject Pinkney's contention that the court's failure to give the *McDonnell Douglas* instruction that Pinkney requested further prejudiced him. As we have

⁸ The jury was asked, "Was Samuel J. Pinkney's race a motivating reason for Cameron Brothers Construction Co.'s decision to terminate Samuel J. Pinkney?" The jury answered this question, "No."

determined, the instructions did not suggest that the jury could not infer discrimination if it were to find Cameron Brothers' proffered reason to be pretextual, and there is no reason to believe that the jury was confused about its ability to make such an inference, even in the absence of a specific instruction telling the jury that such an inference was permissible. Thus, even if we assume that the trial court erred in not giving the "*McDonnell Douglas* instruction" that Pinkney requested once the court decided to give the "at will" instruction, it is not reasonably probable that Pinkney would have obtained a more favorable result if the requested instruction had been given.

Because there is no basis to believe that the "at-will" instruction led the jury to conclude that it could not infer the existence of a discriminatory motive if it were to find that Cameron Brothers' reason for terminating Pinkney was pretextual, we find no prejudicial error.

B. *There is no basis for reversing the jury's verdict rejecting Pinkney's defamation claim*

Pinkney takes issue with the jury's response to a question on the special verdict form pertaining to his defamation claim. The jury answered "Yes" to all of the questions concerning Pinkney's defamation claim except the question, "Did the statements tend to injure Samuel Pinkney in his occupation," to which the jury responded, "No."⁹ Pinkney contends that the jury's verdict is erroneous as a matter of law. He asserts that "no one has or can dispute that allegations of insubordination and concealment of the same would

⁹ Pursuant to the instructions on the verdict form, the jury did not answer any subsequent questions regarding the defamation claim after responding "No" to this question.

tend to injure one's occupation." According to Pinkney, the "Special Verdict was never properly completed" by the jury, because, he contends, the jury's answer to the final question — a question he maintains had a "legally certain answer" — was wrong.

Pinkney proceeded on the theory that Voight committed libel per quod, as opposed to libel per se. Pinkney was therefore required to establish that he suffered some damage as a result of Voight's statements. (See Civ. Code, § 45a.) With respect to the defamation claim, the trial court instructed the jury with a modified version of CACI No. 1705, which was titled "DEFAMATION PER QUOD—ESSENTIAL FACTUAL ELEMENTS." The court informed the jury that the alleged defamatory statements were Voight's statements to Sharlene Cameron or Waneta Lee to the effect that Pinkney was continuing to do side jobs and was lying about it. The written instruction provided:

"Samuel J. Pinkney claims that Richard E. Voight harmed him by making one or more of the following statement(s): (1) that Samuel J. Pinkney admitted a violation of company policy and an intention to continue doing so; (2) that Samuel J. Pinkney attempted to conceal the violation by lying and/or asking others to do so. To establish this claim, Samuel J. Pinkney must prove all of the following:

"Liability

"1. That Richard E. Voight made one or more of the statement(s) to persons other than Samuel J. Pinkney;

"2. That these people reasonably understood the statement(s) were about Samuel J. Pinkney;

"3. That because of the facts and circumstances known to the listeners and readers of the statement(s), they tended to injure Samuel J. Pinkney in his occupation;

"4. That Richard E. Voight failed to use reasonable care to

determine the truth or falsity of the statement(s);

"5. That Samuel J. Pinkney suffered harm to his property, business, profession or occupation; and

"6. That the statement(s) were a substantial factor in causing Samuel J. Pinkney's harm.

"Actual damages

"If Samuel J. Pinkney has proved all of the above, then he is entitled to recover if he proves that Richard E. Voight's wrongful conduct was a substantial factor in causing any of the following actual damages:

"a. Harm to Samuel J. Pinkney's property, business, trade, profession, or occupation;

"b. Expenses Samuel J. Pinkney had to pay as a result of the defamatory statements;

"c. Harm to Samuel J. Pinkney's reputation; or

"d. Shame, mortification, or hurt feelings."

We disagree with Pinkney's assumption that the answer to the question whether Voight's defamatory statements tended to injure Pinkney in his occupation was one that should be determined as a matter of law. There was conflicting evidence about the timing of the incidents and whether Voight's statements played any part in Cameron Brothers's decision to terminate Pinkney's employment. Lee testified that Voight had contacted her either on the afternoon of February 9, or on February 10, to talk to her about the incident involving the stairs. According to Lee, she had already decided to terminate Pinkney by the time Voight initially contacted her. She received Voight's written letter about Pinkney "a few days after." Lee was asked whether the "content of

that letter ha[d] anything to do with [her] decision to terminate Mr. Pinkney on February 9, 2005," and she responded, "No, it did not." Based on this evidence, the jury could reasonably have determined that Voight's defamatory statements did not tend to injure Pinkney in his occupation, because Pinkney's employer had already decided to terminate Pinkney before learning of Voight's statements.

Pinkney suggests that the intent of the question at issue was to ask the jury whether Voight's statements were of the kind that generally would tend to injure any individual in his or her occupation, and that the question the jury may have meant to respond to in the negative was a question of causation, which was the next question on the special verdict form. However, the question that the jury was asked was whether Voight's statements tended to injure Pinkney in his occupation. The question thus specified the situation and implicitly included an element of causation. The jury responded to the question as it was phrased in a manner consistent with evidence that was presented at trial. The fact that the jury did not give this answer in response to the next question on the form—the question regarding causation—does not invalidate the jury's verdict as to this claim. We therefore reject Pinkney's contention that the jury erred in finding that Voight's statements did not tend to injure Pinkney in his occupation.

C. *There is no basis for reversing the jury's verdict rejecting Pinkney's retaliation claim*

Pinkney asserted a claim for retaliation pursuant to Government Code section 12940. Pinkney alleged that Voight filed a civil harassment complaint against Pinkney

some months after Pinkney made his claim of racial discrimination. Pinkney offered evidence that Voight falsely alleged in his complaint that Pinkney had assaulted Voight.

With regard to the retaliation claim, the special verdict form first asked the jury: "Was Samuel J. Pinkney's complaint with the Department of Fair Employment and Housing a motivating reason for Richard Voight's decision to file a Petition for a Restraining Order against Samuel J. Pinkney?" The jury responded "No" to that question, and, pursuant to the instructions on the verdict form, did not answer any of the subsequent questions relating to the retaliation claim.

Pinkney contends that the jury's verdict is contrary to the evidence. According to Pinkney, "[t]here does not appear to be a dispute over whether Voight filed his application for [a] restraining order in large part because of Pinkney's claim of discrimination." Pinkney contends that the verdict is therefore erroneous as a matter of law.

"[The] reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citation.] We review the evidence in the light most favorable to the respondent, resolve all evidentiary conflicts in favor of the prevailing party and indulge all reasonable inferences possible to uphold the jury's verdict. [Citation.]" (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 908.)

At trial, Voight testified that a statement he made regarding Pinkney's wife yelling obscenities at Voight, and Pinkney grabbing Voight's arm, was "100 percent true." Voight was asked, "What prompted you to file that restraining order?" He responded,

"Ongoing harassment from Mr. Pinkney and his wife." When pressed to explain "[w]hat kind of harassment" he was referring to, Voight stated, "Just feeling very uncomfortable. I started getting scared after him flipping me off. His wife would be on the porch taking pictures as I'm driving by or something. Cussing at me, swearing at me. She's a very violent lady." Voight further explained, "I was getting fed up with being harassed on an ongoing basis."

Voight also testified that no one instructed or asked him to file a petition for a restraining order, and that he did not tell his employers or other Cameron Brothers employees that he was going to file the petition. Voight was later asked again, "What prompted you to file the restraining order on your own?" He replied, "My sister is a paralegal, and I was getting advice from her, and she was the only one that recommended just file a restraining order [to] [s]top it." Voight testified that he did not "hold any grudges against Mr. Pinkney" at the time he sought a restraining order. Voight was asked whether he knew that Pinkney had filed a discrimination claim against the Camerons before he filed for a restraining order, and he responded, "Yes." However, Voight testified that he had not cleared the filing of a legal action against Pinkney with the Camerons because, "[i]t [the restraining order] was personal between me and the Pinkneys. The Camerons had nothing to do with this."

Voight's testimony constitutes substantial evidence from which the jury could have concluded that Pinkney's discrimination complaint with the DFEH was not a motivating factor in Voight's decision to file a petition for a restraining order.

Pinkney further contends that the court's instruction regarding "at will" employment tainted the jury with respect to its consideration of the retaliation claim. Specifically, Pinkney asserts that the "at will" instruction dissuaded the jury from finding the existence of the underlying discrimination, and that the jury must therefore have been "reluctant to make a finding of liability on other claims framed as a consequence of an invalid discrimination complaint." As we have already concluded, the jury definitively rejected Pinkney's discrimination claim by concluding that race was not "a motivating reason for Cameron Brothers Construction Co.'s decision to terminate Samuel J. Pinkney." Pinkney provides no sound reasoning to support his suggestion that the "at will" employment instruction somehow intruded into the jury's consideration of the separate retaliation claim.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.